No. 89-1883

In the Supreme Court of the United States

OCTOBER TERM, 1990

TRUCK INSURANCE EXCHANGE, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Interior has authority under Section 10 of the Reclamation Act of 1902, 43 U.S.C. 373, to initially classify lands on the Newlands Federal Reclamation Project in Nevada as either "bench" or "bottom" lands (for purposes of determining the amount of water that should be delivered from Project works to particular farm units under applicable water-rights decrees), subject to later case-by-case review and adjustment at the request of each owner of a farm unit.

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TRUCKEE-CARSON IRRIGATION DISTRICT, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA AND PYRAMID LAKE
PAIUTE TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A116-A129) is reported at 887 F.2d 207. The opinions of the district court (Pet. App. A79-A84, A87-A89, A103-A115) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1989. A petition for rehearing was denied on February 27, 1990. Pet. App. A130-A131. The petition for a writ of certiorari was filed on May 29, 1990 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Two water-right decrees applicable to the Newlands Federal Reclamation Project in Nevada provide for "bench lands" to receive more irrigation water from the Truckee and Carson Rivers than "bottom lands." The decrees do not, however, identify which Project lands fall into either category. Moreover, although "bench land" typically refers to the wave-cut terrace or shelf overlooking a river and "bottom land" typically refers to lower-lying land along a river, the parties and the district court agree that those generalized terrain features are not conclusive under the decrees. This case involves the validity of initial bench/bottom classifications of Newlands Project lands that were adopted by the Secretary of the Interior in his Operating Criteria and Procedures (OCAP) for the Project.

1. a. The water-right decrees for the Truckee and Carson Rivers, known, respectively, as the 1944 *Orr Ditch* decree and the 1980 *Alpine* decree,[1] govern water entitlements for Newlands Project lands. Under each decree, Project bench lands are to receive, after transportation loss, up to 4.5 acre-feet per acre per year (a.f.a.), and bottom lands up to 3.5 a.f.a. As petitioners concede (Pet. 3-4), the decrees do not identify the bench and bottom lands on the Project.

Petitioner Truckee-Carson Irrigation District (TCID), a political subdivision, does not hold any Newlands Project water rights. However, for purposes of this proceeding, the district court permitted it to "represent

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[1] Rights to Truckee River water are governed by the 1944 final decree in *United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. Sept. 8, 1944). See *Nevada* v. *United States*, 463 U.S. 110 (1983). Rights to Carson River water are governed by the 1980 final decree in *United States* v. *Alpine Land & Reservoir Co.*, Civ. No. D-183 BRT (D. Nev. Dec. 18, 1980) (reproduced in part at Pet. App. A30-A33), opinion reported, 503 F. Supp. 877 (D. Nev. 1980) (Pet. App. A1-A29), aff'd as modified, 697 F.2d 851 (9th Cir.) (Pet. App. A34-A48), cert. denied, 464 U.S. 863 (1983).

the position of [Project] landowners." Pet. App. A51. The other petitioners, who intervened below, hold water rights under the *Orr Ditch* and *Alpine* decrees to irrigate Project land.

The United States owns and retains ultimate control over the Newlands Project's irrigation works and equipment, but TCID manages the Project under a Temporary Operation and Maintenance Agreement with the United States dated February 14, 1984. The 1984 Temporary Agreement replaces a 1926 Contract, which was cancelled by the Secretary of the Interior in 1979 because of violations of water-delivery standards by TCID. Under the 1926 Contract, TCID assumed operational control of the Project, *Nevada* v. *United States*, 463 U.S. 110, 118 n.4 (1983), subject to regulations of the Secretary of the Interior.[2] In *Truckee-Carson Irrigation District (TCID)* v. *Secretary of Dep't of Interior*, 742 F.2d 527 (1984), cert. denied, 472 U.S. 1007 (1985), the Ninth Circuit sustained the Secretary's right under the Reclamation Act and the 1926 Contract to issue regula-

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[2] The 1926 Contract is reproduced in the appendix to TCID's petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *TCID* v. *Secretary of Dep't of Interior*, discussed in the text, *infra*. See 84-1233 Pet. App. at A36-A74.

Section 34 of the 1926 Contract provided:

> The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules and regulations, and to add to and modify them as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract, and [TCID] hereby agrees that in the operation of the transferred works, all such rules and regulations will be fully adhered to.

84-1233 Pet. App. at A66. Under Section 7 of the 1926 Contract, TCID similarly agreed to operate the Project works in full compliance with, inter alia, "the National Reclamation Laws" and "the rules and regulations of the Secretary now in force or hereafter promulgated." 84-1233 Pet. App. at A45. Section 12 provided that any land owner who accepts Project water is deemed to have consented to the provisions of the Contract and to have waived any and all objections thereto. *Id.* at A52-A53.

tions governing the operation of the Newlands Project; sustained the particular regulations (OCAP) at issue, finding that they were not arbitrary or capricious under the Administrative Procedure Act (APA), 5 U.S.C. 706 (2)(A); and sustained the Secretary's cancellation of the 1926 Contract because of TCID's willful violation of the regulations by diverting more water than the OCAP allowed.

2. The respective interests of the United States, the petitioners, and respondent Pyramid Lake Paiute Tribe of Indians, are greatly affected by the physical configuration of the Truckee and the Carson Rivers. The Truckee River terminates at Pyramid Lake, within the Pyramid Lake Indian Reservation. But before the Truckee reaches the Lake, a portion of its water is diverted at Derby Dam into the Truckee Canal, pursuant to the *Orr Ditch* decree. The Canal supplies irrigators of the Truckee Division of the Newlands Project and then empties into Lahontan Reservoir on the lower Carson River, from which water is released to supply irrigators on the Project's Carson Division. Because Truckee River water diverted into the Truckee Canal does not reach Pyramid Lake, the Tribe's ~~interests are~~ "vitally interested" in the amount of water used on the Newlands Project. Pet. App. A128; see *id.* at A117; *Nevada* v. *United States*, 463 U.S. at 115-116.

Attempts by the Secretary of the Interior to satisfy these competing water demands began with the issuance of general regulations in 1967 to promote the efficient use of Truckee and Carson River waters. 32 Fed. Reg. 3098. Neither petitioners nor anyone else challenged the regulations when they were adopted, and they remain in effect today. 43 C.F.R. Pt. 418. The regulations were intended to "initiate Departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights, and thereby make additional water available for delivery to Pyramid Lake" in fulfillment of the United States' trust responsibility to the

Tribe. 43 C.F.R. 418.1(b). The regulations were expressly "developed within the framework of agreements, decrees [*Orr Ditch* and *Alpine*], understandings, and obligations of the United States or to which the United States is a party." 43 C.F.R. 418.1(g). They accordingly "prescribe water uses within existing rights" and "do not, in any way, change, amend, modify, abandon, diminish, or extend existing rights." 43 C.F.R. 418.5.

The regulations provide for the Department to adopt Operating Criteria and Procedures (OCAP), which prescribe the details of water management, standards governing the timing and amount of Truckee River diversions into the Truckee Canal, 43 C.F.R. 418.3(a), 418.4(a), and other measures to assure efficient water use with minimum waste. The Tribe challenged the 1972 OCAP in a suit against the Secretary in the United States District Court for the District of Columbia. That court directed the Secretary to revise the OCAP (subject to applicable water-right decrees) to further minimize diversions of Truckee River waters that would otherwise flow into Pyramid Lake. *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972, 1973). The Secretary adopted the new OCAP, 354 F. Supp. at 262-266, and the court retained jurisdiction to review the OCAP for subsequent years. In 1985, that case was transferred to the federal district court in Nevada. Pet. App. A120.

3. The present case concerns the interim OCAP for 1986. See Pet. App. A58-A70. The interim OCAP described the maximum water duties for bench and bottom lands under the *Orr Ditch* and *Alpine* decrees, announced that the Bureau of Reclamation had developed maps that classified Project land on that basis, and explained (*id.* at A60):

> The Bureau's bench and bottom land classification maps as they currently appear and as they may later appear with periodic updates, will be used in making the determination of the maximum quantity of water

> to be delivered to any parcel of land. If at any time TCID disputes any aspect of those maps, TCID shall promptly institute proceedings in the *Alpine* and *Orr Ditch* court to obtain a resolution of such dispute.

TCID challenged the Bureau's classifications en masse in an action filed in May 1986. Pet. App. A53-A70.[3] TCID invoked both the "continuing jurisdiction provisions" of the *Orr Ditch* and *Alpine* decrees and the judicial review provision of the APA, 5 U.S.C. 702. Pet. App. A53. There ensued two years of litigation in which the district court held three evidentiary hearings and reversed itself twice.

a. After the first evidentiary hearing, the district court entered an opinion and order on September 11, 1986, finding the interim OCAP's classifications of bench and bottom lands to be arbitrary and unreasonable and directing that they "not be enforced." Pet. App. A84; see *id.* at A79-A86. Instead, the court held, a bench/bottom map developed by TCID (Exh. 6) would govern water deliveries for the time being and serve as the "starting point" in any future proceedings instituted before the court-appointed water master for reclassification of the lands of a particular farm. *Id.* at A83. On the same day, however, the court granted the United States' and the Tribe's motions for reconsideration because of a sizeable discrepancy in TCID's own bench/bottom classifications. *Id.* at A87-A89. TCID's 1986 map identified 16,133 acres in the Project's Carson Division as bench land entitled to a 4.5 a.f.a. water duty. By constrast, evidence submitted by TCID in support of the water duties later embodied in the 1980 decree in *Alpine* showed only 9005 acres of bench land. Accordingly, the district

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[3] TCID initially filed its objections in *Pyramid Lake Paiute Tribe of Indians* v. *Hodel*, No. CIV-R-85-197-BRT (D. Nev.), the suit transferred from the District of Columbia. In April 1986, the court directed TCID to file a new petition in "a separate action known as D-185-BRT." Pet. App. A51, A121.

court, observing that "[e]ither counsel are not now being completely fair and candid with the court, or the court has been fraudulently misled," set a new hearing to determine the "status of the bench-bottom land classification" when the 1980 *Alpine* decree was entered. *Id.* at A88.

b. The new evidentiary hearing resulted in the remand order of January 27, 1987. Pet. App. A90-A93. In that order, the court found that the "water allocations provided by TCID and currently depicted on Exhibit 6 were not based on bench and bottom classifications," because "TCID never made land or soil-based classifications of bench or bottom lands in the project." *Id.* at A91.[4] The court therefore withdrew its "earlier conclusion that Exhibit 6 should be a guide in classifying lands within the project" and remanded the matter to the Secretary to "prepare and submit * * * a revised initial designation of bench and bottom lands," taking into account certain matters "reflecting the intent of this court in issuing the Alpine decree." *Id.* at A91-A92. The court expressed the view that "[t]he distinction between bench and bottom lands must be a broad, general distinction between land having porous soils with lower water tables and low water holding capacities as compared to lands with more

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[4] The court relied on "uncontradicted evidence" submitted by the United States at the January 1987 hearing, which showed that TCID's Exhibit 6 merely indicated how much water TCID actually delivered to Project lands, without regard to its physical characteristics. Pet. App. A91. In particular, the court stated that Exhibit 6 "reflected TCID's historic water allocations to project lands based ultimately upon the average uses of water on such tracts during the full water years from 1925 to 1932," as adjusted downward by "a reduction" TCID had made in 1977 "for tracts with water duties above 4.5 afa to an allocation of 4.5 afa." *Ibid.* In fact, no relevant water-rights decree provided for a water duty in excess of 4.5 a.f.a. The final decree in *Orr Ditch* set the maximum water duty at 4.5 a.f.a. for Project bench lands, and the pre-1980 temporary decree in *Alpine* had set a water duty at 2.92 a.f.a. for all Project lands. *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. at 257.

impervious soils, and higher water tables, and higher water holding capacities." *Id.* at A92. Significantly, the court "recognize[d] that the basic criteria identified by the Bureau [of Reclamation] in its report" already "generally reflect[ed] this distinction." *Ibid.*

c. In July 1987, the United States filed the Secretary's "remand map" with the court. Pet. App. A95-A102. TCID filed an alternative proposal, known as the "WRD map." The Secretary's remand map reclassified as bottom land approximately 5000 acres that had been identified as bench land in his 1986 map. Conversely, TCID's WRD map reclassified as bench land 8647 more acres than it had identified as such in its earlier proposals. *Id.* at A104.

After a third evidentiary hearing in November 1987, the district court issued its final order on February 11, 1988. Pet. App. A103-A115. The court found both the Secretary's remand map and TCID's WRD map to be defective, and it rejected both. *Id.* at A107-A109. This time, however, the court did not remand the matter to the Secretary for correction or revision of his bench/bottom classifications. It instead adopted TCID's 1986 map (Exh. 6) to serve as the "starting point" to govern Project water allocations until the court-appointed water master ruled otherwise[5]—despite the fact that just 13 months earlier, the court had rejected that same map on the ground that uncontradicted evidence showed that it merely reflected TCID's historical water deliveries that were unrelated to bench/bottom classifications. Pet. App. A91; see note 4, *supra*.[6] The final order also outlined

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[5] The court did modify the effect of TCID's 1986 map in one respect: to the extent TCID's 1987 WRD map agreed with the Secretary's remand map that approximately 2000 acres of Project land should be reclassified from bench to bottom status, the WRD map was to govern. Pet. App. A109-A110.

[6] The United States pointed out this inconsistency to the court of appeals, contending (C.A. Br. 34 n.22) that even if it were assumed that the Secretary's interim bench/bottom classifications

the reclassification procedures to be followed before the water master. *Id.* at A111-A112, A114.[7]

4. The court of appeals reversed and remanded. Pet. App. A116-A129. It identified the "central issue" in the case to be whether the Secretary of the Interior "has rulemaking authority to develop a methodology to distinguish between bench and bottom lands within the Project and to apply those criteria to designated Project lands as bench or bottom, subject to the final determination of the Watermaster in the event of a dispute over a specific farming unit." *Id.* at A123. The court held that the Secretary does have that authority and that the bench/bottom classifications embodied in his OCAP regulations are subject to review under the arbitrary and capricious standard of the APA, 5 U.S.C. 706(2)(A), rather than the de novo standard applied by the district court. Pet. App. A124-A127.

The court of appeals first noted that Section 10 of the Reclamation Act of 1902, 43 U.S.C. 373 "expressly grants broad rulemaking authority to DOI [the Department of the Interior] in connection with reclamation projects." Pet. App. A124. It then rejected petitioners' claim that Section 8 of the Reclamation Act, 43 U.S.C. 383, prevents the Secretary from promulgating regulations setting initial bench/bottom classifications. Section 8, as construed in *California* v. *United States*, 438 U.S. 645 (1978), requires the Secretary (in the absence of a

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were subject to de novo review, the district court's acceptance of the TCID designations it had previously discredited amounted to a clearly erroneous finding of fact. The court of appeals did not reach this contention, but it did note the "apparent inconsistencies" between the district court's final order and its 1987 remand order. Pet. App. A123.

[7] The district court further held that the Tribe "will have no standing to initiate or oppose any petition to the Water Master to change the classification of lands in the Project as bench or bottom lands." Pet. App. A112. The court of appeals reversed that ruling, *id.* at A127-A128, and petitioners do not raise the standing issue in this Court.

contrary congressional directive) to follow state law in the acquisition and distribution of water for reclamation projects. The court reasoned that nothing in the text of Section 8 divests the Secretary of his authority under Section 10 to promulgate regulations setting bench/bottom classifications. Rather, in the court's view, Section 8 identifies standards the Secretary must follow in carrying out those responsibilities under Section 10. Pet. App. A125. The court continued (*id.* at A126):

> [U]nder section 10 of the Act, the DOI is authorized to promulgate regulations establishing initial bench/bottom classifications, provided that the state law beneficial use standards mandated by section 8 are followed. We express no opinion as to whether these particular initial classifications either conform to or violate state law standards. We hold only that, in undertaking to establish an initial bench/bottom classification scheme, the DOI was acting within the scope of its regulatory authority under section 10.

The court of appeals also concluded that the Secretary's initial bench/bottom classifications are entitled to deference by the courts, especially "with respect to questions involving engineering and scientific matters." Pet. App. A127. It therefore instructed the district court, on remand, to review the Secretary's initial bench/bottom classifications under the APA's arbitrary and capricious standard of review, stressing that if the district court should set aside the Secretary's bench/bottom classifications, it should once again remand to the Secretary for revision. *Id.* at A126-A127.[8] The court also stressed that the initial bench/bottom classifications would be subject to further adjustment, as applied to particular farms, in

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[8] The court noted the inconsistency between TCID's initial reliance on "the deferential standards of the Administrative Procedure Act" and its later contention that federal law does not grant the Secretary any functions concerning "bench/bottom classification." Pet. App. A124; see page 6, *supra*.

proceedings instituted before the water master for that purpose. *Id.* at A119, A123, A129.

ARGUMENT

The decision of the court of appeals is correct and, contrary to the petitioners' contention, it is fully consistent with *California* v. *United States*, 438 U.S. 645 (1978), and the requirement under Section 8 of the Reclamation Act that the Secretary proceed in conformity with state law. The rulemaking powers of the Secretary of the Interior with respect to the operation of the Newlands Project and the deference to be accorded his OCAP regulations under the Administrative Procedure Act were previously confirmed by the Ninth Circuit in *TCID* v. *Secretary of Dep't of Interior*, 742 F.2d 527 (1984), and this Court declined to review that holding. 472 U.S. 1007 (1985). There is no reason for a different result here.

Three additional factors weigh against review here: First, this case is but one episode in complex, on-going litigation concerning decreed rights to the waters of the Truckee and Carson Rivers, and the narrow issues resolved below arise out of those unique circumstances—including the failure of the *Orr Ditch* and *Alpine* decrees to identify bench and bottom lands on the Project. Second, the Secretary's bench/bottom classifications only establish *interim* standards, which will be subject to adjustment on a case-by-case basis in proceedings before the water master. Third, this action for judicial review is itself in an interlocutory posture, because the court of appeals remanded to the district court for further proceedings on the validity of the Secretary's interim classifications, which will require resolution of numerous fact-bound issues. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

1. The court of appeals has neither upheld nor set aside the Secretary's initial bench/bottom classifications for Newlands Project lands; it has remanded the matter

to the district court for further review. Nevertheless, petitioners, mischaracterizing these initial designations as permanent and "binding" (Pet. 17), contend that individual water rights have been impaired or reduced (Pet. 15-16) and that the Nevada state law of water rights has been "superseded" and "displaced" (Pet. 11-17).

In truth, the "central issue," as stated by the court of appeals, is exceedingly narrow and far less dramatic. Pet. App. A123. The question posed by the court below was whether the Secretary's rulemaking authority embraces the development of "a methodology to distinguish between bench and bottom lands within the [Newlands] Project and to apply those criteria to designate Project land as bench or bottom, subject to the final determination of the [court-appointed] Watermaster in the event of a dispute over a specific farming unit." *Ibid.* In answering that question in the affirmative, the court of appeals simply held that, until a Project farmer seeks individualized review by the water master of the application of the Secretary's initial bench/bottom classifications to his farm unit, the classifications, reviewed as an exercise of administrative rule-making authority, are to be set aside only if they are arbitrary, capricious, or an abuse of discretion within the meaning of the APA, 5 U.S.C. 706(2)(A).[9] It therefore concluded that the district court erred in conducting de novo review, and remanded for further proceedings. Compare *Permian Basin Area Rate Cases*, 390 U.S. 747, 770-774 (1968) (approving area rates for natural gas, subject to individualized adjustment for particular producers in subsequent proceedings).

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[9] Under the arbitrary and capricious standard, the scope of review is narrow, and the court cannot substitute its judgment for that of the agency, as the district court here did after a trial de novo. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-803, 814-815 (1978).

This ruling presents no issue warranting review. Section 10 of the Reclamation Act, 43 U.S.C. 373, expressly authorizes the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect." This expansive language clearly encompasses the Secretary's issuance of regulations that classify reclamation project lands in order to determine the amount of irrigation water that they should receive from project works in accordance with generally applicable water duties.

Two earlier cases, *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972, 1973), and *TCID* v. *Secretary of Dep't of Interior*, 742 F.2d 527, 529, 532 (9th Cir. 1984), cert. denied, 472 U.S. 1007 (1985)—which petitioners do not discuss or even mention—sustained the Secretary's authority under Section 10 of the Reclamation Act to issue OCAP regulations for the Newlands Project. The Secretary's rulemaking power was also confirmed in the 1944 *Orr Ditch* decree itself, which provides that diversions from the Truckee River at Derby Dam into the Truckee Canal, and thence to Lahontan Reservoir, shall be—

> under such control, disposal *and regulation as the plaintiff* [United States] *may make or desire*, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.[10]

Gov't C.A. Br. 2 (emphasis added). Significantly, TCID stipulated to the entry of the 1944 final decree in *Orr Ditch*. *Nevada* v. *United States*, 463 U.S. at 117-118; *TCID* v. *Secretary of Dep't of Interior*, 742 F.2d at 529.[11]

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[10] Relevant provisions of the *Orr Ditch* decree are reproduced in an addendum to the United States' brief in the court of appeals.

[11] In addition to the parties' agreement in the *Orr Ditch* consent decree, the 1926 Contract between the United States and TCID

Moreover, in *TCID* v. *Secretary of Dep't of Interior*, the Ninth Circuit held that the APA limitations on judicial review applied to TCID's challenge to the OCAP (742 F.2d at 532):

> The [OCAP] * * * were adopted under the direction of the *Tribe* v. *Morton* court [354 F. Supp. 252] after the court and the Secretary considered the Secretary's obligations to TCID, to the water rights' owners, and to the Tribe. * * * After "consider[ing] whether the [promulgation of the operating criteria] was based on a consideration of the relevant factors and whether there has been a clear error of judgment," as required by *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 * * * (1971), we cannot say that the promulgation of the operating criteria was arbitrary or capricious.

Thus, the Secretary's Section 10 rulemaking powers with regard to OCAP for the Project, and the applicable APA constraints on judicial review of such rulemaking, have already been determined as between the Secretary and TCID. These prior rulings are binding on TCID and the Project landowners it represents. *Nevada* v. *United States*, 463 U.S. at 128-130; *Automobile Workers* v. *Brock*, 477 U.S. 274, 284, 290 (1986).

2. Nothing in the Secretary's interim bench/bottom classifications or the court of appeals' decision concerning them impairs the water rights of Newlands Project farmers. To the contrary, it is precisely because the *Orr Ditch* and *Alpine* decrees do *not* establish a specific water duty for each parcel of land within the Project, on the basis of its bench or bottom status, that the Secretary found it necessary to classify the land in order

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stated that the United States reserved the right to make rules to implement the law and the contract, that TCID agreed to adhere to those rules in its operation of the Project, and that individual Project landowners, by accepting water deliveries, agreed to be bound by the Contract (necessarily including its provision for the Secretary to issue rules). See note 2, *supra*.

to determine the amount of water that should be delivered under the general water duties in the decrees. Furthermore, the general regulations under which the OCAP are issued were developed "within the framework" of applicable "decrees" (*Orr Ditch* and *Alpine*), and their purpose is to "prescribe water uses within existing rights," "not, in any way, [to] change, amend, modify, abandon, diminish, or extend existing rights." 43 C.F.R. 418.1(g), 418.5. In other words, the OCAP and the interim bench/bottom classifications they contain were issued in implementation of, not in derogation of, the *Orr Ditch* and *Alpine* decrees. Petitioners therefore err in contending (Pet. 16) that this case involves a "reallocation" of water rights that have already been decreed to Project lands, as in *Nevada* v. *United States*, and that "DOI has attempted once again to shift Newlands Project water rights about as it sees fit." *Ibid.*

In any event, any serious contention by Project farmers that their rights to the use of water have been taken or impaired is premature. Only after the status of the Secretary's initial bench/bottom classifications is settled in further district court proceedings—and only after a water user has utilized his opportunity to request adjustment of those classifications, as applied to his land, in proceedings before the water master—would any such claim of a deprivation of property rights be ripe. *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 199-200 (1985); *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 349 (1986).

3. a. Nor does anything in the Secretary's interim classifications or the court of appeals' decision supersede or displace Nevada law or conflict with *California* v. *United States*, 438 U.S. 645 (1978), which emphasized the requirement in Section 8 of the Reclamation Act, 43 U.S.C. 383, that the Secretary proceed in conformity with state law. To the contrary, the court of appeals held that the Secretary's exercise of Section 10 rulemaking power, while proper in this case, is limited by "state

law beneficial use standards mandated by" Section 8 of the Act, and it remanded to the district court without deciding "whether these particular initial classifications either conform to or violate state law standards." Pet. App. A126-A127.

California v. *United States* did not precisely dilineate the scope of the Secretary's Section 10 rulemaking power with respect to reclamation projects. But it did assure that "the actual * * * operation of the projects would be in the [Secretary's] hands." 438 U.S. at 664, quoted in *Nevada* v. *United States*, 463 U.S. at 122. Indeed, on remand in *California* v. *United States*, the Ninth Circuit, while upholding state-ordered conditions on project water impoundment and distribution, warned that a state "cannot impose burdensome conditions which were not contemplated by Congress, or which work against the achievement of the [federal reclamation] project's goals." *United States* v. *California, State Water Resources Control Bd.*, 694 F.2d 1171, 1182 (9th Cir. 1982). The Ninth Circuit also noted that the deference to state law, announced in *California* v. *United States*, did not include deference to "state control over the actual operation of the [reclamation project] dam as one of the purposes intended by Congress" in Section 8 of the Reclamation Act. 694 F.2d at 1182. See also *United States* v. *71.22 Acres of Land in Utah County*, 665 F. Supp. 885, 889 (D. Utah 1987). Here, the Secretary unquestionably retains lawful control over the Project works. *California* v. *United States*, 438 U.S. at 664.

In that capacity, and as part of his OCAP for the Project, the Secretary has done nothing more than attempt to carry out the water delivery requirements spelled out in the *Orr Ditch* and *Alpine* decrees for bench and bottom lands. Unless the Secretary is to make deliveries on demand—which would not be an orderly means of complying with the water-rights decrees [12]—

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[12] By contrast, TCID's 1986 bench/bottom map, which the district court ultimately accepted in 1988, Pet. App. A110, had previ-

it was incumbent upon him to formulate the bench and bottom land designations that those decrees had failed to provide. In doing so, the Secretary acknowledged that disputes concerning application of his interim standards are subject to "resolution" by the "*Alpine* and *Orr Ditch* court." Pet. App. A60. Thus, the Secretary's formulation of bench/bottom designations was a necessary part of his duty to supervise the operation of the Project within the framework of the decrees, and it therefore was well within the purview of Section 10 rulemaking.

Moreover, prior to the Secretary's issuance of the 1986 OCAP, TCID was itself required in operating the Newlands Project to determine which Project lands should be regarded as bench lands and which as bottom lands, so that it would deliver only the amount of water permitted under the *Orr Ditch* and *Alpine* decrees. Indeed, TCID urged the district court to approve its determinations, rather than the Secretary's, for that purpose. If TCID's own informal bench/bottom determinations prior to 1986 and its formal proposals to the district court on that subject in 1986 and 1987 did not violate the command in Section 8 of the Reclamation Act to respect state law, then it follows that the Secretary's bench/bottom classifications are similarly not inconsistent with that command. After all, TCID acts as the Secretary's agent in operating the Newlands Project works and has at all times agreed to operate the Project in accordance with the Reclamation Act as well as rules and regulations issued by the Secretary.

b. Aside from the foregoing analytical flaws, petitioners' invocation of the backdrop of state law has a highly abstract quality as well. Petitioners do not present this

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ously been found by the same court in 1987 to be deficient for purposes of implementing the decrees. The court in 1987 deemed that map to be merely reflective of TCID's historic water delivery practices and habits, rather than of an effort by TCID to be guided by the meaning of the decrees or to ascertain the physical characteristics of bench and bottom lands. *Id.* at A91.

Court with any concrete objections to the substance of the Secretary's initial bench/bottom classifications or the methodology he used to develop them. They do not challenge the court of appeals' view of the scope of Section 10 of the Reclamation Act as a general matter or the court's holding that the Secretary's regulations under that Section, including the classifications at issue here, are properly reviewed under the arbitrary and capricious standard of the APA.[13] They do not explain how the classifications conflict with any substantive state-law rule governing beneficial use of water. And they fail to show that TCID's own bench/bottom classifications, as accepted by the district court, are more finely tuned to the dictates of state law.[14]

In addition, petitioners fail to identify anything in the record suggesting that any state agency has purported to impose requirements on the Secretary's operation of the Newlands Project that are pertinent to the Secretary's

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[13] The court of appeals' ruling on the standard of review is consistent with state law. The constraints on judicial review by Nevada state courts of state agency decisions regarding water-rights matters (notably those of the Nevada state engineer) are no less stringent, and perhaps more restrictive, than those imposed by the APA on federal court review of federal agency action. Thus, the state engineer's decisions, though not final and conclusive, *Salmon River Canal Co.* v. *Bell Brand Ranches, Inc.*, 564 F.2d 1244, 1248-1249 (9th Cir. 1977), cert. denied, 436 U.S. 918 (1978), are prima facie correct and given great deference in the state courts on review. Nev. Rev. Stat. § 533.450(9) (1985), as construed, *State* v. *Morros*, 766 P.2d 263, 265-266 (Nev. 1988). A state court is not free to substitute its own de novo judgment for that of the state engineer with regard to water rights. *Office of State Engineer* v. *Curtis Park Manor*, 692 P.2d 495, 497 (Nev. 1985). This limited standard of review applies to decisions by the state engineer in his administration of state-court decreed water rights. Nev. Rev. Stat. § 533.450 (1) (1985); see *id.* §§ 533.220(1), 533.310(1).

[14] The district court's rejection of the Secretary's remand map and approval of TCID's 1986 map was not based on any stated difference in the manner in which they interacted with state law. Pet. App. A103-A115.

classification of Project lands. This is in sharp contrast with *California* v. *United States*, where this Court was confronted with actual, not hypothetical, orders of a state agency, setting conditions on water impoundment and water delivery in connection with a federal reclamation project. Thus, neither petitioners nor the State of Nevada (which is one of the amici curiae) contend that the state engineer has any role in making initial designations of which Project lands are bench or bottom,[15] in otherwise operating the Project, or in supervising the court-appointed water master charged with administering the *Orr Ditch* and *Alpine* decrees. Moreover, petitioners cite no Nevada statute, decision, or rule specifically addressing how different types of lands in a water-rights decree must be classified for purposes of water-delivery entitlements. Petitioner do cite various procedures under the laws of various States, which they describe (Pet. 14) as giving "definition and meaning to the general principles of state substantive law" and which they speculate (Pet. 14-15) *might* be disrupted or displaced by possible *future* actions and rulemakings by the Secretary. But exactly what Nevada law is currently breached or even implicated by the decision below remains unspecified. Petitioners' objections based on the backdrop of state law therefore are unfounded and do not warrant review.[16]

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[15] Neither the *Orr Ditch* decree nor the *Alpine* decree assigns any land-classification function to the state engineer.

[16] Petitioners and amici object (Pet. 10; Amici Br. 15) to one statement by the court of appeals. The court of appeals, after observing that *California* v. *United States* interpreted Section 8 of the Reclamation Act to provide that state law governs distribution as well as acquisition of water, stated: "Conversely, in the absence of congressional directives, DOI can regulate distribution, acquisition, and vested water rights if its regulations are not inconsistent with state law." Pet. App. A125. There is no need here to consider all possible applications of this description of the Court's teaching in *California* v. *United States*. It is sufficient to note that, in the context of this case, the court of appeals' statement correctly

4. Petitioners further contend (Pet. 17-18) that the Ninth Circuit has enabled the Secretary to infringe upon the reserved jurisdiction of the district court to construe and administer its own water-rights decrees. Once again, however, if TCID's own identification of bench and bottom lands in its operation of the Newlands Project prior to issuance of the 1986 OCAP did not impermissibly interfere with the district court's reserved jurisdiction under the *Orr Ditch* and *Alpine* decrees, then the Secretary's issuance of interm classifications to be followed by TCID in identifying such lands likewise does not conflict with the decrees. Moreover, petitioners' assertion ignores the interlocutory posture of this phase of the case, in which the district court retains broad options. The district court remains free to test the Secretary's initial bench/bottom classifications against any contrary requirements of state law that petitioners might identify on remand, to review the classifications anew under APA standards, and (through its water master) to adjust those classifications as applied to particular farm units.

Finally, the course of the proceedings below, in which the district court continually shifted the legal grounds underpinning its successive decisions, makes this case an especially unsuitable candidate for current review. In particular, the district court's opinions do not reveal any sustained and coherent interpretation of what the references to "bench" and "bottom" lands actually meant in the text of the *Orr Ditch* and *Alpine* decrees.[17] It is ap-

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reflects the assurance given by *California* v. *United States* that operational control of reclamation projects remains with the Secretary, 438 U.S. at 664, and it appropriately reflects the absence on the present record of any state intervention or any specification of state laws or procedures that might arguably override anything the Secretary did in formulating initial bench/bottom classifications. In any event, this Court's function is to review judgments, not language in lower court opinions. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956).

[17] For example, the district court's 1987 remand order instructed the Secretary to consider, in preparing his bench/bottom map,

propriate that these unresolved questions first be sorted out and decided on remand to the district court, rather than here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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"matters reflecting the intent of this court in issuing the [1980] Alpine decree." Pet. App. A92. Yet in its 1988 final order, the district court justified its acceptance of TCID's bench/bottom designations on "ten years of experience of water deliveries based on the Carson and Truckee River decrees and the practical needs of the farmers." *Id.* at A110. Thus, the court changed the major criterion for bench/bottom designations from an analysis of its own intent in issuing the *Alpine* decree to an analysis of water-delivery "experience" that developed, for the most part, after the *Alpine* decree was entered.

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